No. 96 961 DEC 16 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TONNELLE AVENUE BOOKS & VIDEO, INC.,

Petitioner,

—v.—

TOWNSHIP OF NORTH BERGEN, NEW JERSEY, TOWNSHIP OF NORTH BERGEN BOARD OF COMMISSIONERS, NICHOLAS J. SACCO, FRANK GARGUILO, LEO GATTONI, JR., MICHAEL DI GIOVANNI, THOMAS LIGGIO, EDWARD F. RANNOU, Individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

From July 1991, petitioner has operated an adult bookstore on Tonnelle Avenue, exercising First Amendment rights, selling and exhibiting sexually oriented books and videos for consenting adults. While Tonnelle Avenue is zoned for light industrial use, the Lower Court found as a fact that Tonnelle Avenue is a de facto commercial zone. For fourteen (14) years, petitioner, exercising First Amendment rights, and a juice bar, because of nudity, were the only retail entities ever prosecuted for being commercial entities operating in the light industrial zone. The questions are:

1. Contrary to every federal case relying on *Yick-Wo v. Hopkins*, 118 U.S. 356 (1886), may the New Jersey Appellate Division utilize a due process rationally related test to petitioner's First Amendment Equal Protection as applied claim?

2. Under federal case law using *Yick-Wo*, the proper class is only all retail entities exercising First Amendment rights or presenting nudity and prosecuted for violating the industrial zoning ordinance. May the Appellate Division define the class as all retailers who applied for and were denied a variance in the industrial zone, the denial of which may be unrelated to any constitutional violation?

3. Under the "evil eye" *Yick-Wo* First Amendment discriminatory law enforcement test, may the Appellate Division use a due process test with regard to the facts instead of making the required "independent appellate review . . . "

As an adjunct thereto, may the Appellate Division disregard and misrepresent all evidence of illicit motive in the record and completely mis-state the prior May 11, 1994 Appellate Division decision by asserting that decison had relied on Zoning Board expert testimony that 95% of the zone was light industrial?

LIST OF PARTIES AND RULE 29.6 LIST

The parties to the proceedings below were the petitioner Tonnelle Avenue Books & Video, Inc. (sometimes petitioner or Tonnelle), and respondents Township of North Bergen, New Jersey, Township of North Bergen Board of Commissioners, Nicholas J. Sacco, Frank Garguilo, Leo Gattoni, Jr., Michael DiGiovanni, Thomas Liggio, Edward F. Rannou, Individually.

The North Bergen Zoning Board of Adjustment (Zoning Board) was named as a defendant in the second amended complaint, but after May 1994, no relief was sought against the Zoning Board, and it is not a party to this petition.

Under Rule 29.6, petitioner Tonnelle Avenue Books & Video, Inc. certifies it has no parent companies or subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Tonnelle Avenue Books & Video, Inc. (Tonnelle), respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Appellate Division, State of New Jersey, entered in the above entitled proceeding on July 17, 1996.

OPINIONS BELOW

All of the opinions of the Superior (Trial) Court and Appellate Division are unreported. The May 11, 1994 opinion of the

Appellate Division, New Jersey, reversed the Superior Court's (Ryan, J.) August 1992 grant of a variance. (21a-30a)[1] That May 11, 1994 decision dealt only with zoning variance and did not pass upon petitioner's constitutional claims. Based upon the May 11, 1994 decision, the Superior Court dismissed petitioner's complaint.

On July 14, 1994, the Appellate Division summarily reversed and directed the Lower Court to consider petitioner's constitutional claims. (20a) The Lower Court then rendered its opinion and judgment for petitioner on January 26 and May 26, 1995. (9a, 13a)

The July 17, 1996 judgment of the Appellate Division reversed the Lower Court and directed the entry of judgment for respondents. (1a-8a)

By decisions filed November 13, 1996, the Supreme Court of the State of New Jersey denied the Certification Petition but granted the petitioner's motion to supplement the record. These two opinions are, at present, unreported and are reproduced in the Appendix at pages 17a-18a.

JURISDICTION

Under 42 USC § 1983 and the First Amendment, petitioner brought this suit in the Law Division of the Superior Court in the State of New Jersey, Hudson County, attacking the respondent's (Township of North Bergen) efforts to close down petitioner's premises based upon a local obscenity ordinance #925-59. Thereafter, petitioner under 42 USC § 1983, the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, claimed, inter alia, that respondent Township was applying the Zoning Ordinance only as a pretext to stifle First Amendment activities.

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[1] All references herein (__"a") are to appendices hereto.

On July 17, 1996, the Appellate Division reversed the Lower Court's decision and directed the entry of judgment for respondents. By order filed November 13, 1996, the New Jersey Supreme Court denied petitioner's timely filed certification petition.

The jurisdiction of this Court to review the judgment of the Appellate Division of the State of New Jersey is invoked under 28 USC § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Three constitutional provisions and one statute are involved.

> AMENDMENT I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> AMENDMENT XIV, Section 1, Due Process and Equal Protection. Section 1. *** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> 28 U.S.C. § 2111 Harmless Error.
>
> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

STATEMENT OF THE CASE

From July 1991, the petitioner, exercising First Amendment rights, has operated an adult bookstore in respondent Township of North Bergen on Tonnelle Avenue. Even though the Township claims it is merely enforcing its zoning ordinance, the Township's first effort to force petitioner out of business had nothing to do with zoning. Instead, the Township first resorted to the local obscenity ordinance.

This compelled petitioner, on August 1, 1991, to file its first complaint. (Da1-Da5)[2] The Zoning Board was not even named as a defendant. (Da 1) Only when the respondent Township realized that it could not succeed on the basis of the local obscenity ordinance did the case then become a zoning case, as the Lower Court found and held on February 7 and August 4, 1992, and July 22, 1994. (Ct.Hr. 2/7/92 T 52, L. 3-6; Ct.Hr. 8/4/92 T 8, L. 20-25; T 9, L. 1; Ct. Hr. 7/22/94, T. 21, L. 7-14, T.22, L. 1-17; Da 170, 171)

On August 29, 1991, in a blatant example of respondents' discriminatory intent, three new ordinances were introduced which were specifically aimed at petitioner by eliminating any possible location in the Township where petitioner could lawfully conduct its First Amendment business. (Da 57-60, 4th amended complaint, Da 61-66, three ordinances) The August 29, 1991 ordinance introduction was accompanied by statements of the Mayor at a press conference of August 28, 1991, announcing in ringing terms that he would never accept petitioner's First Amendment bookstore. (14a, 1/26/95 Ryan

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[2] Da is an abbreviation for respondents' appendix to the Appellate Division. The record consists of two appendices of respondents, which include the pleadings, the prior May 11 and July 14, 1994 Appellate Division decisions, the opinion of Judge Ryan; the petitioner's appendix (abbreviated Pa); and the transcripts of six Court hearings, commencing February 7, 1992, with their findings of fact and conclusions of law, and abbreviated by the Court Hearing date, transcript, page and line number. Copies of all of the foregoing were forwarded to all New Jersey Courts.

Op., Da 172-174, Proposed Findings of Fact, Pa 16, Mayor's Press Conference) The July 17, 1996 decision fails to make reference to any of these facts. (1a-8a)

From August 1991 through December 1991, petitioner Tonnelle obtained stays of execution on condition it proceed before the Zoning Board.

Following hearings, the Board denied a variance to petitioner Tonnelle. The foregoing resulted in further Court proceedings whereby petitioner again raised its First Amendment and Equal Protection claims. On February 7, 1992, the Lower Court, specifically reserving decision on all constitutional issues, remanded to the Zoning Board for further findings on whether a variance was to be denied because of traffic and whether the isolated nature of the location (where there is no pedestrian traffic, thus making it inaccessible to children) and the adult zoning ordinance should warrant a variance.

Upon the Board's remand decision denying a variance, the Court held a further hearing of August 4, 1992 and granted a variance.

The area where petitioner is located is concededly zoned for light industrial uses. Nonetheless, *as the Trial Court found* in 1992 and 1994, the evidence was overwhelming that "all kinds of commercial uses [are] tolerated in this area", the defendant Township and the Zoning Board had repeatedly from at least 1980, "in reality", treated the industrial zone as a retail commercial zone, finding that the "*casual observer *** would not consider this to be an industrial zone*," that it was an *industrial zone* "*on paper*" only and not "*in reality*", has never been "*treated*" by the respondents as an industrial zone, and that "*it was a de facto commercial zone*". (Ct.Hr. 8/4/92, T. 29, L. 8-9; T. 30, L. 8-13, Ct. Hr. 2/7/92, T. 55, L. 22-25; T. 56, L. 1-2, Da 177, 178; Ct. Hr. 6/10/94, T. 9, L. 22, 23, T. 11, L. 23, 24, emphasis supplied)

For fourteen years, respondent Township has never, *but never*, attempted to enforce the Zoning Law against any retail store in the industrial zone, except the petitioner exercising First Amendment rights, and against a juice bar on the same property in order to prevent nudity or partial nudity. (Da 93; Ct.Hr. 2/7/92, T. 18, L.14-17, p. 20, L. 13-15; Pa 44, Da 153)

At the February 7, 1992 hearing, respondents' counsel admitted the prior 1980 M-1 industrial zone is "*almost exact*" to the present 1987 industrial zone. (2/7/92 Hr. T.28, L.13-17, emphasis supplied, quoted in Pl. 5/18/94 aff., p. 16, 17, ¶41, Pa 44, 45, Da 176, 177) Since respondents conceded that the light industrial zone has remained essentially the same for more than ten (10) years, this emphasizes the importance of the Trial Court's finding that the "*casual observer *** would not consider this to be an industrial zone*", that it was "*an industrial zone on paper*", but not "*in reality*", never "*treated*" as an industrial zone, and that "*it was a de facto commercial zone*". (Ct.Hr. 8/4/92,T.29, L.8-9; T.30, L.8-13, Ct.Hr. 2/7/92, T.55, L.22-25; T.56,L.1-2, Da 177,178; Ct.Hr.6/10/94, T.9,L.22,23, T.11, L.23,24, emphasis supplied)

Mr. Louis Scala, the Township Building Inspector and Zoning Officer, on July 29, 1991, not only issued a Continuing Certificate of Occupancy (CCO) to petitioner, but also testified that this " *** existing use was [not] contrary to the zoning ordinance." (Da 170) The July 17, 1996 Appellate Division decision also makes *no* reference to any of these critical facts. (1a-8a)

Following the Zoning Board Hearings, and between November 1 and November 6, 1991, respondent Township stationed a police car with flashing lights in front of petitioner's premises, posted a red notice stating the premises were closed, and approached many customers calling their attention to the notice. [Pa 48, 49; Da 72; Fifteenth Count of the Fifth Amended Complaint, Da 181] *The Trial Court's January 26, 1995 decision recites*:

> "From November 1st to November 6th, 1991, there was police surveillance on the premises. This was halted by court order." (14a)

On petitioner's May 19, 1994 motion and in response to a question of the Trial Court, the Township Attorney stated the Town would picket and photograph all of plaintiff's customers. (June 10, 1994 Ct.Hr. T. 8, L. 3-5; Da 185, Proposed Findings of Fact).

The Appellate Division's July 17, 1996 opinion "reject[s] *** [these] claims because they are [allegedly] unsupported in the record" (6a). However, these claims are supported in the record, the first by a specific finding of the Trial Court. (14a)

Returning to the chronology, based upon the Appellate Division's May 11, 1994 Zoning Variance Decision reversal, the Trial Court granted summary judgment to respondents. On emergent (meaning emergency) application and presentation of exactly the same inter-related First Amendment and Equal Protection claims here made, the Appellate Division summarily reversed and directed the Trial Court to consider the petitioner's constitutional claims. (20a, 7/14/94 AD Dec.) By opinion and judgment of January 26 and May 26, 1995, the Trial Court granted summary judgment to petitioner under 42 USC § 1983. (10a-16a)

On July 17, 1996, the Appellate Division reversed. The Appellate Division first held that due process controls when a First Amendment Equal Protection claim is made that an ordinance is being applied to destroy the First Amendment. The Appellate Division then held the protected class consists of retail stores applying for but denied a variance. (6a, 7a) However, the denial of a variance may have nothing to do with any constitutional rights.

And, lastly, on the evil eye prong of the *Yick-Wo* First Amendment claim, the Appellate Division failed to make any

reference to multiple facts of illicit motive contained in the record, and held that two (2) additional facts were "unsupported" in the record when, in fact, they were in the record. (6a)

In addition, the Appellate Division's July 17, 1996 opinion twice, and without foundation, incorrectly stated that the prior May 11, 1994 Appellate Division opinion had relied on a Zoning Board expert who supposedly testified that 95% of the zone was industrial. (6a, 7a) However, the May 11, 1994 opinion had held only that the Zoning Board's expert had stated within "a *radius of 250 feet* *** [out of a zone distance of approximately 6,000 feet, less than 4%] 21 out of 27 uses were industrial"[3] (28a, 5/11/94 AD Op.). 4% is not 95%.

Further, the May 11, 1994 opinion asserted that the Zoning Board expert opined that on a [one] piece of property, 95% of that one-piece of property was industrial.(24a, 28a) Obviously, one piece of property is not 6,000 feet, or one-mile, or the entire industrial zone.

As the Lower Court concretely held, there are no facts in dispute. (13a, Ryan, J. 1/26/95 Op.) (Ct. Hr. 8/19/94, T. 4, L. 10-25; T. 5, L. 1-4; T.23, L. 8-11; T. 25, L. 10-14; T. 32, L. 18-20). (No "big factual disputes. Characterizations, labels, whatever you want to call them, will be disputed.") (Quote is from page 32 of the 8/19/94 hearing, L. 18-20).

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[3] It is of no consequence that the Board's expert could not have testified that "within that limit", 250 feet, 21 out of 27 uses conformed. Let us assume the Board expert testified 21 out of 27 uses, i.e. 77%, conformed in the entire zone. However, that directly contradicts the Trial Court's finding that the "*casual observer*" *** *would not consider this to be an industrial zone*" and that "*it was a de facto commercial zone*". (Ct.Hr. 8/4/92, T.29, L.8-9; T.30, L.8-13, Ct.Hr. 2/7/92, T.55, L.22-25; T.56, L.1-2, Da 177, 178; Ct.Hr. 6/10/94, T.9, L.22, 23, T.11, L. 23, 24, emphasis supplied)

Reasons for Granting the Writ

1. There is a direct conflict between the Appellate Division holding that *Schad v. Borough of Mount Ephraim*, 452 U.S. at 61, 68 (1981) requires that the Township need make only a due-process rationally related showing to uphold an ordinance where First Amendment rights are destroyed by a facially neutral ordinance, as applied, and *Yick-Wo v. Hopkins*, 118 US. 356, 373-374 (1886) and every case applying *Yick-Wo* to First Amendment rights.

The Appellate Division first correctly held that *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, involved a facial attack on a Mount Ephraim zoning ordinance. The Appellate Division then, in complete error, held that where there was no facial insufficiency, "no fundamental right implicated on the face of this zoning ordinance", the ordinance is measured by a due-process test and the government need only show that the ordinance was "rationally related to a legitimate governmental interest ***". (5a, citing *Schad*, id. at 68)

However, that is not the rule applied under the *Yick Wo v. Hopkins*, 118 U.S. at 373-374 equal protection and interrelated First Amendment case law. Where an ordinance on its face is content neutral, i.e., no fundamental right is implicated on the face of the ordinance, but it is being applied or used in a discriminatory fashion to destroy First Amendment rights, then the governmental action must be gauged under the strict scrutiny test of the First Amendment, not due process. *Holder v. City of Allentown*, 987 F.2d 188, 197-199 (CA 3, 1993); *Show-World Center, Inc. v. Walsh*, 438 F.Supp. 642, 651-652 (SDNY 1977) (relying on and citing *Yick Wo v. Hopkins*, 118 U.S. 356); *303 West 42nd Street v. Klein*, 46 NY2d 686, 693-698, 416 NYS2d 219, 223-236 (1979); *LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 589, 590 (CA 2 1994); *United States v. Steele*, 461 F.2d 1148, 1150-1152 (CA 9, 1972); *United States v. Falk*, 479 F2d 616 (CA 7, 1973, en banc)

Holder sued because the City fired him under a local residency ordinance. It required that the public employee reside in the city. (987 F.2d at 197)

The Appellate Division in this case recognized that the residence requirement in *Holder* was "facially neutral". (7/17/96 App.Div. Dec., 6a) Nonetheless, *Holder* applied this facially neutral ordinance to a *Yick Wo* claim of unequal hand and evil eye under the First Amendment. *Holder* held:

> "Public officials engage in unconstitutional discriminatory application or administration of a facially impartial law when they seek to enforce the law 'on the basis of an unjustifiable standard, such as race, or religion, or some other arbitrary factor', or when they seek to enforce the law in order 'to prevent the exercise of a fundamental right.' " (987 F.2d at 197)

In sharp contrast, *Holder* affirmed the District Court's dismissal of plaintiff Holder's "due process claims". (987 F.2d at 200)[4]

In *United States v. Steele*, supra, 461 F.2d at 1150-1152, there was prosecution for failing to answer questions on the census form: on its face, content neutral and, on its face, implicating no First Amendment right. It held that the *Yick Wo* defense was successfully raised because there was discriminatory prosecution in that "the authorities purposely discriminated against those who chose to exercise their First Amendment rights". (461 F.2d at 1151; the conviction was reversed).[5]

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[4] The Third Circuit Court of Appeals could not have affirmed the dismissal of Mr. Holder's due-process claims and reversed as to his discriminatory First Amendment Claim unless that due-process rationally related test does *not*, repeat does *not*, apply to a statute fair on its face but applied in an unconstitutional manner in deprivation of First Amendment rights.

[5] *United States v. Falk*, supra, 479 F.2d 616 (prosecution for failing to possess draft registration card, a content-neutral statute; held en

In absolutely none of the above cases was the due process rationally related test used. Aside from direct conflict, the absence of any definitive holding by this court that *Yick-Wo* must be used where a statute or ordinance is being applied to destroy First Amendment rights should prompt the grant of certiorari.

2. There is a conflict in principle between the Appellate Division holding that *Schad,* 452 U.S. at 68, requires the Township meet only a due process rationally related test where, as here, there is a content-neutral ordinance being applied to destroy First Amendment rights and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67 (1963).

In *Bantam Books,* a Rhode Island statute was, on its face, content-neutral, and it did not regulate or suppress obscenity. (372 U.S. at 66) However, the Supreme Court looked through the form to the substance and held that informal censorship, which is certainly what is involved here, was sufficient to warrant injunctive relief to halt the interference with First Amendment rights.

Furthermore, while technically *Schad* and *Trombetta v. Atlantic City*, 181 NJ Super.203 (Law Div. 1981), aff'd 187 NJ Super.351 (App.Div. 1982) do not involve an as-applied attack, nonetheless, one cannot read these cases and conclude that a due-process rationally related rule is appropriate to a First Amendment as-applied case. *Trombetta*, relied on by the Trial Court (15a) involved, inter alia, a zoning ordinance which indirectly infringed upon First Amendment rights. *Trombetta* held that one cannot avoid a constitutional guarantee "under some other guise". (181 NJ Super. at 232) That is exactly this case.

3. There is a direct conflict between the July 17, 1996 Appellate Division holding that under *Yick-Wo* and *Show-*

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banc under *Yick-Wo* and the First Amendment, defendant is entitled to raise the issue of discriminatory law enforcement because the statute, as applied, was being used to attack defendant's free speech rights).

World (and presumably *Holder*), that the correct class consists of retail entities applying for but denied a variance (7a) and *Yick-Wo,* and every case applying *Yick-Wo*. All these cases fix the correct class of entities as those similarly situated (here retail stores operating in an industrial zone) discriminated against because of their exercise of First Amendment rights, *not* all retail stores applying for, but denied, a variance.

For example, a retail store which sells shoes could apply for and be denied a variance because it did not fill out the right form or had inadequate parking, which has nothing to do with being prosecuted or treated selectively because of any constitutional claim, much less the First Amendment.

LaTrieste Restaurant, 40 F.3d at 590, applied the correct rule to a topless bar which attacked a content-neutral 10 P.M. curfew ordinance. *LaTrieste* held:

> "In *LeClair*, for example, we wrote that a violation of equal protection for selective enforcement would arise if:
>
> (1) the person, compared with others similarly situated, was selectively treated; and
>
> (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.
>
> *Id.* at 609-10. *See also 303 W. 32nd St. Corp. v. Klein,* 46 N.Y.2d 686, 416 N.Y.S.2d 219, 389 N.E.2d 815 (1979); ***" (40 F.3d at 590)

Under *Yick-Wo* and every case applying *Yick-Wo* (except this Appellate Division case), the correct class consists of those retail entities prosecuted under the facially neutral zoning ordinance only because such retail establishments exercise First Amendment rights, not just that they were denied a vari-

ance.[6] Except for petitioner, and the juice bar prosecuted to stop nudity, there were no other retail entities operating which, in fourteen (14) years, were prosecuted for violating the industrial zoning ordinance.

4. We turn to the evil-eye prong of *Yick-Wo*. After ignoring the facts of malicious motive set forth in the petition and after holding two of petitioner's *Yick-Wo* First Amendment Equal Protection claims "unsupported in the record", the Appellate Division cited *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 484 (1974) for the proposition that the Court "will only decide whether the fact-findings could have reasonably been reached on 'sufficient or substantial' credible evidence." The Appellate Division's July 17, 1996 opinion then totally without basis emphasized that in its "earlier [May 11, 1994] opinion" the Zoning Board's expert had stated that "*** 95% of the uses conformed to the zoning ***" and "*** 95% of the zone remained industrial". (6a, 7a)

The foregoing is in direct conflict with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. ___, 132 L.Ed.2d 487, 499, 500, 115 S.Ct. 2338, 2344 (1995) and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 503 (1984). These cases make clear that the Appellate Division is not limited to seeing whether there was "sufficient" or "substantial" evidence to determine the facts, but must independently review the facts to make sure there is no First Amendment violation.

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[6] Assuming that applying for and being denied a variance is relevant, there was evidence undisputed in the record that the petitioner was, in fact, the only retail store which in ten (10) years had applied for, but was denied a variance. Petitioner's counsel presented this evidence at the February 7, 1992 hearing, transcript page 4, lines 22-25, transcript page 5, lines 1-7, and again at transcript page 11, lines 20-25. Petitioner's motion to the Supreme Court to supplement the record by adding this material was granted. (18a)

It most certainly is in direct conflict with *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927) (cited by *Hurley* 115 S.Ct. at 2344) and 28 U.S.C. 2111, substantial rights. For *Fiske* held the Supreme Court "will review a finding of fact *** [made] without evidence to support it" when a Federal right is denied. (274 U.S. at 385-386)

As set forth in the statement of the case, the Appellate Division's opinion omits all reference to the adult use zoning ordinance, which prohibited petitioner from operating anywhere in the Township, or the Mayor's August 28, 1991 press conference statement as to why the ordinances were introduced, to drive petitioner out of business, or the respondent Township Mayor's statement that the respondent Township will do anything, including picketing, to prevent petitioner from operating. (14a, 15a, Ryan J. Op.)

One would not know from the Appellate Division's opinion that the zoning officer, Mr. Scala, opined that petitioner's adult use was not "contrary to the zoning ordinance". (Da 170)

With reference to two of the elements of illicit motive, police surveillance and photographing of customers, they were rejected because, according to the Appellate Division holding, these claims "are unsupported in the record". (7/17/96 App.Div. Op., 6a) However, as set forth in the statement of the case, proof of these elements is contained in the record, one concretely set forth in the Lower Court's January 26, 1995 opinion. (14a, Pa 48, 49; 6/10/94 Ct.Hr., p. 8, L. 3-5, Da 185)

The Appellate Division's opinion does not mention the undisputed fact that for fourteen (14) years, the Township brought absolutely no enforcement action against any commercial use in the industrial zone, except petitioner and the juice bar to prevent nudity. The reason is obvious. Respondents' motive was to prevent nudity and the exercise of First

Amendment rights which must, according to the Mayor, be stopped.

The Appellate Division July 17, 1996 opinion relied on the prior May 11, 1994 decision and held that the Board expert had allegedly "stated that 95% of the uses conformed to the zoning" and "95% of the zone remained industrial". (6a, 7a) This is totally without foundation.

The May 11, 1994 Appellate Division decision did *not* remotely rely on the Zoning Board's expert to state that 95% of the use conformed, i.e., was industrial. The May 11, 1994 decision relied on a Board expert who testified that "within a radius of *250 feet* (*not* the entire zone of approximtely 6,000 feet), 21 of 27 of the uses" conformed. (28a)

In addition the Board expert testified that *** "it was poor planning to introduce a retail use on to *a* [meaning *one*] property" [where on that *one* property] 95% is industrial. (24a, 28a) Obviously, one piece of property is not the entire zone of approximately one mile.

Further, petitioner points out that the Trial Court *found as a fact* that, in reality, *the light industrial zone is a retail commercial zone*. (Ct.Hr.8/4/92, T.29, L.8-9; T.30, L. 8-13, Ct. Hr. 2/7/92, T. 55, L. 22-25; T.56, L. 1-2, Da 177, 178; Ct.Hr. 6/10/94, T.9, L. 22, 23, T. 11, L. 23, 24)

5. The Appellate Division's reliance upon *Rivkin v. Dover Rent Leveling Board*, 143 NJ 352, 380 (1996) is a further reason to grant the petition. *Rivkin* involved procedural due process on rent increase applications. *Rivkin* does not involve any First Amendment activity.

CONCLUSION

The Writ Should Be Granted, the Judgment of the Appellate Division Reversed, the Judgment of the Superior Court Reinstated with Interest and with Directions to Update the Legal Fees.

Dated: December 13, 1996

Respectfully submitted,

RALPH J. SCHWARZ, JR.
21 East 40th Street, 7th floor
New York NY 10016
(212) 532-0911

Counsel of Record for Petitioner

On the Petition:

RALPH J. SCHWARZ, JR., ESQ.
VINCENT S. VERDIRAMO, ESQ.
JON P. CAMPBELL, ESQ.
RICHARD S. BROWN, JR., ESQ.

APPENDIX

Appendix A

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Filed July 17, 1996
A-6052-94T3

TONNELLE AVENUE BOOKS & VIDEOS, INC.,

Plaintiff-Respondent,

—v.—

TOWNSHIP OF NORTH BERGEN, NEW JERSEY, TOWNSHIP OF NORTH BERGEN BOARD OF COMMISSIONERS, NICHOLAS J. SACCO, FRANK GARGUILO, LEO GATTONI, JR., MICHAEL DI GIOVANNI, THOMAS LIGGIO, and EDWARD F. RANNOU, individually,

Defendants-Appellants,

—and—

NORTH BERGEN ZONING BOARD OF ADJUSTMENT,

Defendant.

Argued: May 18, 1996—Decided July 17, 1996

Before Judges Petrella, P.G. Levy and Eichen.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County.

Brian M. Chewcaskie argued the cause for appellant (Gittleman, Muhlstock and Chewcaskie, attorneys, Mr. Chewcaskie, on the brief).

Ralph J. Schwarz, Jr. of the New York bar, admitted pro hac vice, argued the cause for respondent (Verdiramo & Verdiramo, and Summervile, Radding & Campbell, attorneys; Vincent S. Verdiramo, Jon P. Campbell and Mr. Schwarz, on the brief).

PER CURIAM

The North Bergen Zoning Board of Adjustment denied plaintiff's application for a use variance to operate a retail business for the sale or rental of sexually explicit videos and related merchandise. When the Law Division judge ruled for plaintiff in its action in lieu of prerogative writs, we reversed, reinstating the Board's denial of the variance application because it was supported by substantial evidence in the record.

The essential facts relevant to the first appeal are that plaintiff's property is zoned for industrial use, and in that zone twenty-one of the twenty-seven properties conform to the use restrictions of the zoning ordinance. The judge had perceived a "flavor of intimidation by the public . . . [noting that] the elected officials are doing everything in their power to stop [plaintiff]." He decided that because of the existence of other nonconforming uses in the area and the isolated nature of the area being ideally suited to this "sensitive" use, the area was not really an industrial zone but a de facto commercial zone.

We reversed there, not only because the judge failed to evaluate the evidence supporting the Board's presumptively valid decision, but also because plaintiff's proposed business use in an industrial zone clearly did not serve the public welfare. We relied on *Fobe Assocs. v. Mayor of Demarest*, 74 *N.J.*

519, 534-35 (1977) and *Medici v. BPR Co.*, 107 *N.J.* 1 (1987). Moreover, we stated "[t]he existence of other nonconforming uses in the vicinity of the proposed use is not, of itself, a special reason," and there was "no proof in the record that permitted uses are inappropriate for the site, and there is no evidence that the video store would promote the general welfare as required by *Medici*." Thus, we concluded, "the Board could have rationally decided that the west side of Tonnelle Avenue was not predominately used for commercial purposes and the proposed use would not promote the general welfare." *See Tonnelle Ave. Books & Video, Inc. v. Tp. N. Bergen*, No. A-651-92 (App. Div. May 11, 1994), *certif. denied*, 137 *N.J.* 314 (1994).

The dispute continued since plaintiff's complaint alleged violations of its civil rights and other constitutional deprivations inasmuch as it had challenged the manner in which the zoning ordinance had been applied. Judge Ryan granted plaintiff's motion for summary judgment, and harking back to his originally expressed view of official harassment, he wrote in his opinion:

> The history of this case together with the previous history of the industrial zone in question, makes it clear beyond a doubt that this business was denied a variance because of its distasteful nature, which, however, is constitutionally protected. Other commercial activities in the zone had been approved by variance or toleration.

He held that plaintiff had a right of action for denial of its constitutional rights under 42 *U.S.C.A.* § 1983, and was entitled to "damages in the nature of attorneys' fees" under 42 *U.S.C.A.* § 1988 (b). After a plenary hearing concerning the award of attorney's fees, the judge signed an order declaring the zoning ordinance, as applied, to be violative of plaintiff's First and Fourteenth Amendment rights. He permanently enjoined the Township from interfering with plaintiff's business, and granted plaintiff attorneys' fees. This appeal ensued.

The power of local governments to zone and control land use is broad, but the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." *Schad v. Borough of Mt. Ephraim*, 452 *U.S.* 61, 68, 101 *S.Ct.* 2176, 2182, 68 *L.Ed.*, 2d 671, 680 (1981) (quoting *Moore v. City of East Cleveland, Ohio*, 431 *U.S.* 494, 514, 97 *S.Ct.* 1932, 1943 52 *L.Ed.* 2d 531, 546 (1977) (Stevens, J., concurring)). Zoning is subject to judicial review, and the standard of review is determined by the nature of the right assertedly threatened or violated, rather than by the power being exercised or the specific limitation imposed. *Schad, supra*, 452 *U.S.* at 68, 101 *S.Ct.* at 2182, 68 *L.Ed.* 2d at 680. If a zoning ordinance directly impinges on a constitutionally protected right, there is no presumption in favor of its validity. *Bell v. Stafford Tp.*, 110 *N.J.* 384, 395 (1988).

Schad set forth the appropriate analysis of a zoning challenge:

> Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property. But an ordinance may fail even under that limited standard of review.
>
> Beyond that, as is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.
>
> [452 *U.S.* at 68, 101 *S.Ct.* at 2182-83, 68 *L.Ed.*, 2d at 680 (citations omitted).]

Additionally, the court must not only assess the substantiality of the governmental interests asserted, but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amend-

ment. *See Schad, supra*, 452 *U.S.* at 70, 101 *S.Ct.* at 2183, 68 *L.Ed.* 2d at 681.

Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech." This guarantee applies to expressive conduct and has been held applicable to the states by reason of the "liberty" protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Gitlow v. New York*, 268 *U.S.* 652, 664, 45 *S.Ct.* 625, 629, 69 *L.Ed.* 1138, 1144 (1925). The Fourteenth Amendment is applicable to municipal ordinances as well as to state statutes. *Silco Automatic Vending Co. v. Puma*, 105 *N.J. Super*, 72, 89 (Law Div. 1969), *rev'd on other grounds*, 108 *N.J. Super*, 427 (App. Div. 1980). If the zoning ordinance impinged on plaintiff's free speech claims, it would clearly be subject to strict scrutiny review.

The North Bergen zoning ordinance states the purpose of the "Industrial" zone was "[t]o strenghten the tax base; to provide employment opportunities and appropriate development of land in relation to existing uses; [and] to protect environmental standards." Under the zoning ordinance, the principal permitted uses included: (1) uses of a light manufacturing nature, employing a process free from objectionable odors, fumes, dust, vibrations or noise, subject to performance standards; (2) wholesale business, storage or distribution and warehousing; (3) truck terminals; and 4) motor vehicle repairs, but not automobile body repair shops. Shopping centers and hotels were considered conditional uses.

North Bergen's zoning ordinance is neutral on its face. The zoning ordinance does not say one cannot operate an adult bookstore in North Bergen; by implication, it says one cannot operate any commercial enterprise in an industrial zone. There is no fundamental right implicated on the face ot this zoning ordinance, and thus, defendants must only show the ordinance was rationally related to a legitimate government interest to sustain it. *Schad, supra*, 452 *U.S.* at 68, *S.Ct.* at 2182, 68 *L.Ed.* 2d at 680.

Citing *Yick Wo v. Hopkins*, 118 *U.S.* 356, 6 *S.Ct.* 1064, 30 *L.Ed.* 220 (1886), plaintiff claims the ordinance, as applied, was unconstitutional because North Bergen enforced the industrial zone against plaintiff while allowing other commercial uses to operate in the same zone. Plaintiff also cites *Holder v. City of Allentown*, 987 *F.*2d 188, 197 (3d Cir. 1993), and *Show-World Center, Inc. v. Walsh*, 438 *F. Supp.* 642 (S.D.N.Y. 1977). These cases all stand for the proposition that a facially neutral law is still unconstitutional if enforcement is undertaken in a discriminatory fashion, such as to prevent the exercise of a fundamental right.

Plaintiff claims North Bergen did not enforce the zoning ordinance in the industrial zone in a content-neutral fashion because: 1) the township continued another retail use on the same property but only on the condition of no nudity; (2) the township stationed police cars with flashing lights outside of plaintiff's business; and 3) the township attorney stated that if plaintiff were to move its operations, the township would picket the store and take photographs of all customers. We reject the second and third claims because they are unsuported in the record. However, the first concerns the crucial question of whether the evidence supported Judge Ryan's fact-finding that North Bergen permitted other retail businesses to operate in this industrial zone, but attempted to shut-down plaintiff solely based on the nature of its use. When an error in a fact-finding is alleged, the scope of appellate review is limited. The court will only decide whether the fact-findings made could reasonably have been reached on "sufficient" or "substantial" credible evidence present in the record, considering the proof as a whole. *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 *N.J.*, 474, 484 (1974).

As noted in our earlier opinion, plaintiff's expert testified that the recent development in the zone had been commercial rather than industrial, and the Board's expert stated that 95% of the uses conformed to the zoning. Additionally, defendants stipulated that North American Lobster Company was permitted to renovate an existing structure on Tonnelle Avenue

for use as a wholesale fish distribution center and, as an ancillary use, a retail store and clam bar. Also, Marriott Corporation was granted a variance to erect a Roy Rogers fast food restaurant on Tonnelle Avenue. There, the variance was granted, among other reasons, because the area around the property had retail and wholesale business operations including five service stations and at least eight diner type restaurants. There was evidence that other commercial uses were granted variances, but 95% of the zone remained industrial. Unlike in *Yick Wo* and *Show-World*, there was no evidence that plaintiff was the *only* business which applied for a variance but was denied. Just because other businesses were granted variances does not prove that variances were granted to all businesses who sought them except plaintiff. Without evidence showing that plaintiff's application for a variance for a retail use was the only one denied, it was error to determine that the zoning law was applied in a discriminatory fashion. We conclude that the judge's finding that plaintiff was denied a use variance only because of the nature of its business, was not supported by substantial credible evidence.

Plaintiff also argues, relying on *Katobimar Realty Co. v. Webster*, 20 *N.J.* 114 (1955), that under a theory of cumulative zoning, a retail use would not conflict with an industrial use and should be permitted. While that is an accurate reading of *Katobimar*, a later case, *Kozesnik v. Montgomery Tp.*, 24 *N.J.* 154, 169 (1957) stated:

> It is urged that if quarrying is permitted, it is arbitrary to exclude other industrial uses and so-called "higher" uses, such as commercial ones.
>
> We are not unmindful that in the infancy of zoning it was the general practice to permit higher uses in the less restricted district. The statute, however, does not so command. Rather, it broadly permits any reasonable scheme with comports with the legislative standards and thus leaves ample room for new ideas. Experience has satisfied many that, for example, homes are no more

appropriate in an industrial district than industry in a residential one.

Accordingly, we find no merit to the contention that plaintiff's retail use should be allowed as a higher use than the industrial zone in which it resides.

Having decided plaintiff did not show the zoning ordinance was applied in an unconstitutional manner, we need not consider plaintiff's claims for relief under 42 *U.S.C.A.* § 1983. However, further comment is warranted by *Rivkin v. Dover Tp. Rent Leveling Bd.*, 143 *N.J.* 352, 358 (1996), which held that absent egregious misconduct that shocks the conscience, as long as there is an adequate and timely remedy to redress irregularities in the proceedings, the party aggrieved by determinations of a local administrative board cannot maintain a § 1983 claim. "In the setting of municipal land use controversies, our State has well established procedures, including judicial review of municipal governance, to assure government under law." *Id.* at 382. The record does not contain substantial evidence of a deprivation of plaintiff's property rights by trampling on its First Amendment right to free speech.

To summarize, we hold there was insufficient evidence to conclude that the zoning ordinance was applied in an unconstitutional manner, and therefore reverse the order granting summary judgment for plaintiff, remand to the trial judge and direct that judgment be entered for defendants.

Reversed and remanded.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ [ILLEGIBLE]
Clerk

Appendix B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—HUDSON COUNTY

Civil Action
Filed May 26, 1995
Docket No. HUD-L-7479-91
Joseph T. Ryan, J.S.C.

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Admitted Pro Hac Vice
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Attorneys for Plaintiff
694 Bergen Avenue
Jersey City, New Jersey 07304
(201) 435-4891

TONNELLE AVENUE BOOKS & VIDEO, INC.,

Plaintiff,

—v.—

TOWNSHIP OF NORTH BERGEN, NEW JERSEY, TOWNSHIP OF NORTH BERGEN BOARD OF COMMISSIONERS, NICHOLAS J. SACCO, FRANK GARGUILO, LEO GATTONI, JR., MICHAEL DI GIOVANNI, THOMAS LIGGIO, EDWARD F. RANNOU, INDIVIDUALLY, AND NORTH BERGEN BOARD OF ADJUSTMENT,

Defendants.

ORDER AND FINAL JUDGMENT

This matter being opened to the Court by Verdiramo & Verdiramo, Esqs., and Summerville, Radding & Campbell, Esqs., for the entry of final judgment, and for legal fees under 42 U.S.C. 1988 (b), pursuant to a January 26, 1995 letter opinion of this Court, Vincent S. Verdiramo, Jon P. Campbell, and Ralph J. Schwarz, Jr., appearing for plaintiff, and Brian M. Chewcaskie and Gerald Monahan appearing for defendants, and it appearing that this action was commenced by plaintiff in August 1991 by the filing of a first complaint under 42 U.S.C. 1983 attacking on constitutional grounds a North Bergen obscenity ordinance 925-59 and, thereafter, the Court having issued several temporary restraints enjoining the closedown of plaintiff's adult bookstore pending Zoning Board of Adjustment (Zoning Board) hearings, and further Court rulings, and having considered six different complaints and affidavits and memorandum of law and the oral argument of February 7, 1992, and having ordered a remand to the Zoning Board, and on August 4, 1992 having heard further argument following new findings of the Zoning Board, and this Court having on August 4, 1992 granted a variance and following the Appellate Division May 11, 1994 reversal of the

variance, denied plaintiff's May 19, 1994 motion for a permanent injunction and dismissed plaintiff's constitutional claims and

WHEREAS on July 14, 1994, the Appellate Division reversed this Court's judgment dismissing plaintiff's constitutional claims and directed this Court to consider plaintiff's constitutional claims and plaintiff having renewed its said motion to declare unconstitutional the North Bergen zoning ordinance as applied to plaintiff's adult bookstore, as violative of the First and Fourteenth Amendments to the United States Constitution and to enjoin any enforcement of and/or interference with its operation and the matter having been argued in July and August of 1994, and the Court having considered the multiple papers, affidavits and law memoranda submitted, including plaintiff's August 25, 1994 Proposed Findings of Fact, defendants' Response to plaintiff's Proposed Findings of Fact, and plaintiff's September 21, 1994 reply affidavit, and having ruled that the plaintiff had shown a probability of success on the merits and continued all injunctive relief, and the Court having rendered its January 26, 1995 letter opinion holding that the basic historical facts are not really in dispute, granting plaintiff's summary judgment motion, and further holding that plaintiff was entitled to legal fees under 42 U.S.C. 1988(b) and having reviewed the affidavit of legal services submitted by plaintiff's counsel pursuant to said opinion,

IT IS on this 26th day of May, 1995,

ORDERED AND ADJUDGED that plaintiff's motion for summary judgment, declaring the I-1 Industrial Zone of the North Bergen zoning ordinance as applied to plaintiff's adult retail store is violative of the First and Fourteenth Amendments to the United States Constitution since plaintiff's adult use was clearly discriminated against by all relevant Township agencies, is hereby granted; and

IT IS FURTHER ORDERED AND ADJUDGED that defendant Township, its agents, servants and employees are hereby permanently enjoined from interfering with plaintiff's adult

bookstore because of the nature of its business, including plaintiff's operating a retail store in the I-1 Light Industrial zone, and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff recover from the defendant Township, pursuant to 42 U.S.C. 1988 (b), the plaintiff's legal fees and disbursements in the total amount of $68,326.39 for Vincent S. Verdiramo, plus $90,589.35 for Jon P. Campbell, and $194,734.00 for Ralph J. Schwarz, Jr.

/s/ JOSEPH T. RYAN
Joseph T. Ryan, J.S.C.

May 26, 1995

Appendix C

Letter Opinion of Hon. Joseph T. Ryan, JSC
dated January 26, 1995

[LETTERHEAD OF SUPERIOR COURT OF NEW JERSEY]

Vincent Verdiramo, Esq.
Verdiramo & Verdiramo
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Gerald Monahan, Esq.
322-48th Street
Union City, N.J. 07087

Re: Tonnelle Avenue Books & Video, Inc. v.
Township of North Bergen, et als.

Docket No. Hud-L-7479-91

LETTER OPINION

Dear Counsellors:

At the oral argument on August 4, 1992 I ruled that the North Bergen Board of Adjustment was arbitrary in denying the variance. The Appellate Division reversed, holding that I could not substitute my views for those of the Board. On the remand I ruled that the constitutional issues had been subsumed by that decision. Another appeal was taken, and a different Part of the Appellate Division ruled that they had not been subsumed. The plaintiff is moving for summary judgment on the constitutional issues. The basic historical facts are not really in dispute, and they need not be reviewed in great detail.

The plaintiff's adult video store opened in the summer of 1991. It received summonses for building code violations as well as a violation of an old obscenity ordinance. The township later agreed not to apply the obscenity ordinance to this business.

On July 9, 1991 a Certificate of Continued Occupancy was issued. It was later revoked and this revocation was upheld on appeal to the Board of Adjustment.

On August 28, 1991 the Mayor held a press conference which in effect condemned the presence of the plaintiff's distasteful business in North Bergen. He announced the introduction of three new ordinances, including one which prohibited this kind of business anywhere within 200 feet of a residential zone. As later determined, this in effect zoned such businesses out of existence. I had previously commented on the record that the need to have such a business in a commercial zone would expose it to passing women and children. These new ordinances were adopted.

On October 11, 1991 a Certificate of Continued Occupancy was issued to a juice bar on the same tract of land, with the condition that there be no nudity on the premises.

From November lst to November 6th, 1991 there was police surveillance on the premises. This was halted by court order.

The plaintiff applied to the Board of Adjustment for a variance to operate this commercial business in an industrial zone. This resulted in a series of hearings and remands. The variance was initially denied because of alleged traffic problems. This had no basis in fact and the case was remanded.

At a subsequent hearing the variance was denied for a number of reasons, one of which was the alleged ability to operate elsewhere in North Bergen. This was impossible because of the aforesaid 200 foot limit. All of the commercial strips in North Bergen are within that distance of residential zones. At the oral argument on February 7, 1992, the case was remanded with specific directions to consider the suitability of the plaintiff's highway location because of its isolated nature.

The wheels started to spin again. On February 20, 1992 new ordinances were introduced repealing the 1991 ordinance with the 200 foot limitation. On March 5, 1992 the Township Commission voted to pass these repealer ordinances, although the Planning Board had not yet acted as required by law. At a special meeting on March 10, 1992 the Planning Board jumped through the Mayor's hoop once again. They approved the repeal of the very ordinances whose passage they had approved in the prior year. On March 18, 1992 the Board of Adjustment again voted to deny the variance, even though they did not know that the Planning Board's approval had taken place.

At the oral argument on August 4, 1992 I made my decision that the denial of the variance had been arbitrary. At that time I reviewed the history of the case and commented on the big hurry that had taken place in March. I said that I did not intend to remand the case to any agency in North Bergen, because no agency would view it objectively. I also commented on the makeup of the Board of Adjustment which included the Mayor's brother and the aide to another commissioner.

The history of this case together with the previous history of the industrial zone in question, makes it clear beyond a doubt that this business was denied a variance because of its distasteful nature, which, however, is constitutionally protected. Other commercial activities in the zone had been approved by variance or toleration.

It is well established that ordinances cannot be enforced solely to limit constitutional activities. See *Trombetta v. Atlantic City*, 191 N.J. Super. 203 (Law Div. 1981), affirmed 187 N.J. Super. 351 (App. Div. 1982).

The plaintiff has a right of action for a denial of its constitutional activities, pursuant to 42 USC #1983. Plaintiff is therefore entitled to its damages in the nature of attorney's fees, which are allowed by 42 USC #1988(b). This can be accomplished by an affidavit of services, unless some party requests a hearing.

The appropriate order should be submitted pursuant to the 5 day rule.

Very truly yours,

/s/ JOSEPH T. RYAN, J.S.C.
Joseph T. Ryan, J.S.C.

JTR/jw

Appendix D

SUPREME COURT OF NEW JERSEY
C-337 September Term 1996
42,793

Filed November 13, 1996

TONNELLE AVENUE BOOKS & VIDEOS,

Plaintiff-Petitioner,

—v.—

TOWNSHIP OF NORTH BERGEN, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6052-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 12th day of November, 1996.

/s/ STEPHEN TOWNSEND
CLERK OF THE SUPREME COURT

Appendix E

SUPREME COURT OF NEW JERSEY
September Term 1996
M-401/402
42,793

Filed November 13, 1996

TONNELLE AVENUE BOOKS & VIDEOS,

Plaintiff-Movant,

—v.—

TOWNSHIP OF NORTH BERGEN, et al.,

Defendants-Respondents.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file a reply brief (M-401) is granted; and it is further

ORDERED that the motion to expand the record (M-402) is granted.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 12th day of November, 1996.

/s/ STEPHEN TOWNSEND
CLERK OF THE SUPREME COURT

Appendix F

ORDER ON EMERGENT APPLICATION filed June 14, 1994

Received July 14, 1996

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART: L
JUDGE(S): BRODY
DREIER

TONNELLE AVENUE BOOKS & VIDEOS,

Plaintiff-Appellant,

—v.—

TOWNSHIP OF NORTH BERGEN, et al.,

Defendants-Respondents.

EMERGENT APPLICATION FILED 7/13/94 BY: Vincent S. Verdiramo, atty. for appellant; Ralph S. Schwarz, pro hac vice for appellant; Jon Campbell, for appellant.
ANSWER(S) FILED: 7/13/94 BY: Brian M. Chewcaskie, atty. for Twp. of N. Bergen
BY: Gerald Monahan, for N. Bergen Bd. of Adj.
APPEARANCE ONLY:
DATE SUBMITTED TO COURT: 7/14/93
DATE ARGUED: 7/14/93

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 14TH DAY OF JULY 1994, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR
STAY PENDING APPEAL

GRANTED	DENIED	OTHER
		X

SUPPLEMENTAL:

The trial court mistakenly understood our opinion in this matter as foreclosing its consideration of the constitutional issues plaintiff has raised and that were reserved for later consideration when the matter was first before the trial court.

We therefore summarily reverse the judgment for defendants and remand the matter for consideration of the constitutional issues.

Meanwhile, we stay our judgment until further order of the trial court respecting whether plaintiff's store may remain in business during the trial court's consideration of the constitutional issues, provided plaintiff moves for such temporary relief within ten days.

FOR THE COURT

/s/ WARREN BRODY
WARREN BRODY, P.J.A.D.

Appendix G

Appellate Division Decision filed May 11, 1994

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-0651-92T3
Filed May 11, 1994

TONNELLE AVENUE BOOKS & VIDEO, INC.,

Plaintiff-Respondent,

—v.—

TOWNSHIP OF NORTH BERGEN, NEW JERSEY, TOWNSHIP OF NORTH BERGEN BOARD OF COMMISSIONERS, NICHOLAS J. SACCO, FRANK GARGUILO, LEO GATTONI, JR., MICHAEL DI GIOVANNI, THOMAS LIGGIO, EDWARD F. RANNOU, INDIVIDUALLY, NORTH BERGEN ZONING BOARD OF ADJUSTMENT,

Defendants-Appellants.

Argued February 22, 1994—Decided May 11, 1994

Before Judges J.H. Coleman and Levy.

On appeal from Superior Court, Law Division, Hudson County.

Brian M. Chewcaskie argued the cause on behalf of appellants North Bergen Zoning Board of Adjustment,

Township of Bergen and individual appellants (Gittleman, Muhlstock and Chewcaskie and Gerald Monahan, attorneys; Brian M. Chewcaskie and Gerald Monahan, on the joint brief).

Jon P. Campbell argued the cause on behalf of respondent (Verdiramo & Verdiramo; Summerville, Radding & Campbell; and Ralph J. Schwarz, Jr., of the New York bar, attorneys; Jon P. Campbell, Vincent S. Verdiramo and Ralph J. Schwarz, Jr., on the brief).

PER CURIAM

Plaintiff sought a use variance but the zoning board of adjustment denied the application. Plaintiff filed an action in lieu of prerogative writs in the Law Division, and after a bench trial the court ruled for plaintiff. The board appealed. We reverse and reinstate the board's denial of plaintiff's application.

I.

Plaintiff, Tonnelle Avenue Books and Video, Inc. ("TABV"), operates a retail business consisting of the sale and/or rental of sexually explicit videos, paraphernalia and adult novelty items, and provides 20 viewing booths where patrons may preview videos for a fee. The record before defendant North Bergen Zoning Board of Adjustment ("the Board") reveals TABV is located on the corner of Tonnelle Avenue and Dell Avenue. It is only accessible from the jughandle for Seacaucus Road, north of the store, and an entrance on Tonnelle Avenue, because Tonnelle Avenue is divided by a concrete center divider isolating the west side of the street from the east side. Plaintiff's property is on the west side of street, directly across from the edge of a large resi-

dential district. Plaintiff's business is confined to 2,600 square feet in a building of approximately 48,000 square feet on a lot of 62,700 square feet. An automobile repair business is located in the back of the building and a juice bar, located in a separate building on the property, was given a certificate of occupancy during the time plaintiff was seeking permission to operate its business at the site.

The property is located in the industrial zone designated District I in the North Bergen zoning ordinance. This zone extends from Seacaucus Road to Route 3 on the west side of Tonnelle Avenue and from 10th Avenue to the railroad right of way on the east side of Tonnelle Avenue. Under the zoning ordinance, the principal permitted uses in this district include (1) uses of a light manufacturing nature, employing a process free from objectionable odors, fumes, dust, vibrations or noise, subject to performance standards; (2) wholesale business, storage, distribution and warehousing; (3) truck terminals; and (4) motor vehicle repairs, but not automobile body repair shops. Shopping centers and hotels are considered conditional uses. In this zone, on the west side of Tonnelle Avenue, there are 15 active properties, and 13 conform to the ordinance. On the east side within a 1,000 feet radius of the property, there are 12 active properties of which 8 are conforming. In total, of the 27 properties located in this zone, 21 conform to the permitted uses.

Plaintiff failed to obtain the proper construction permits, sign approval and certificate of occupancy prior to its operation. On July 15, 1991, plaintiff was cited for these violations as well as given a municipal summons for violation of a township obscenity ordinance. The proper permits and licenses were subsequently issued. On August 1, 1991, plaintiff filed a complaint in lieu of prerogative writs seeking to restrain the township from enforcing the obscenity ordinance. The following day, the township admitted the ordinance was invalid and temporary restraints were ordered. That same day, the construction code official revoked the certificate of continued occupancy because the zoning ordinance prohibited

commercial uses in this industrial zone. Notably, that day the building inspector also observed 20 viewing booths not reflected on the construction plans submitted.

Plaintiff appealed the revocation of its certificate of continued occupancy to the Board and also applied for a use variance under *N.J.S.A.* 40:55D-70d(1). The trial court issued an order restraining the township from closing plaintiff's business pending resolution by the Board. After a series of hearings, the Board affirmed the revocation, determining plaintiff's commercial use was a nonpermitted use in its zone, and it denied the application for a use variance. In a resolution memorializing its decision, the Board made explicit findings of fact, all supported by evidence submitted at the hearings, and stated this conclusion:

> The Board finds that for the reasons expressed above, this Board finds that no special reasons have been presented by the applicant so as to justify the granting of the use variance. Furthermore, the Board finds that the predominance of the conforming industrial uses, especially on the west side of Tonnelle Avenue, the fact that the proposal attempts to insert a non-performing (sic) use in a building, 95 percent of which is conforming, the substantial deficit in off-street parking spaces and the particular problems this lack off-street parking would likely have on traffic congestion, and the dangers in entering and exiting the property as well as danger to pedestrians using the the lower parking lot, the Board concludes that the proposed use would be detrimental to the Zoning Ordinance and the Master Plan and create an unacceptable hazard for pedestrian and motor vehicle traffic in the area.

Plaintiff amended its complaint in the Law Division to include an appeal from the denial of its requested variance. A pretrial order scheduled the trial for February 7, 1992, and limited the issues to whether the zoning ordinance was unconstitutional and whether the revocation of the certificate of

continued occupancy and the denial of the variance was arbitrary or unreasonable.

After a trial limited to those issues, the court upheld the revocation of the certificate of continued occupancy. However, by order of February 19, 1992, the judge reserved decision on the constitutional challenge to the zoning ordinance and, finding the Board's reasons for denying the variance regarding access and parking unsupported by the record, remanded the matter to the Board for a determination as to whether the premises were particularly suited for the proposed use due to its isolated location and the impact of the zoning ordinances.

The Board affirmed its earlier decision, and the matter returned to the trial judge on August 4, 1992. He perceived improprieties in the Board's determination, observing:

> I have no intention of remanding this case to any agency within the Township of North Bergen. I am convinced that no agency within the Town of North Bergen, will really view this objectively. The case has a flavor of intimidation by the public. The elected officials are convinced that the public is against it and the elected officials are doing everything in their power to stop it.

He found the Board did not make specific findings and its denial of the variance was arbitrary, unreasonable and capricious. He based his decision upon the other nonconforming uses in the area and the isolated nature of the area being ideally suited to this "sensitive" use. In his opinion, the area did not appear to be an industrial zone but a *de facto* commercial zone. As a result, by order of September 9, 1992, the trial judge granted the variance to plaintiff on the condition that it post a sign prohibiting vehicular entry directly from Tonnelle Avenue.

II.

As has often been said:

> Review of the decision of a board of adjustment denying such a variance because of the failure to satisfy the negative criteria, like the review of decisions of local land use agencies generally, begins with the recognition that the board's decision is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable. (citations omitted) Underlying the presumption is the recognition that such boards possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion.
>
> [*See, e.g., Sica v. Bd. Adj. Tp. of Wall*, 127 *N.J.* 152, 166-67 (1992).]

When a board of adjustment has denied an application for a use variance, "the plaintiff has the heavy burden of proving that the evidence presented to the board was so overwhelmingly in favor of the applicant that the board's action can be said to be arbitrary, capricious or unreasonable." *Medical Realty Assoc. v. Bd. of Adjustment*, 228 *N.J.Super.* 226, 233 (App. Div. 1988). The use of these three words is not meant to ascribe some sort of iniquity to the board but merely to state that reversible error has occurred.

If the findings of fact made by the board of adjustment are supported by the record and its conclusions therefrom valid, then the trial court, sitting as an appellate court, *must affirm the board's action even though the court itself might have decided differently. See Shell Oil Co. v. Zoning Bd. of Shrewsbury*, 127 *N.J.Super.* 60 (App. Div. 1973), *rev'd*, 64 *N.J.* 334 (1974). A court should give greater deference to the denial of a variance than to a grant because "generally speaking more is to be feared from . . . ill-advised grants of variances than by refusals thereof . . . ." *Beirn v. Morris*, 14 *N.J.* 529, 536 (1954); *Mahler v. Borough of Fair Lawn*, 94 *N.J.Super.* 173, 186 (App. Div. 1967), *aff'd*, 55 *N.J.* 1 (1969). When the vari-

ance is denied, the court should review the resolution explaining the board's reasons for refusing the variance, and if the court concludes the board's refusal is not supported by the record, the usual procedure is to remand to the board rather than to affirmatively make the ruling for the board.

> The proper scope of judicial review, however, is not to suggest a decision that may be better than the one made by the board of adjustment or planning board, but to determine whether the board could reasonably have reached its decision. (citations omitted) Such a decision is presumed valid and should not be set aside unless it is arbitrary, capricious, or unreasonable.
>
> [*Davis Enterprises v. Karpf*, 105 *N.J.* 476, 485 (1987).]

In this matter, the record before the Board contains evidence supporting the decision to deny the variance. The Board based its decision on the testimony of a professional planner, but the trial judge did not accept that testimony because it ascribed improper motives to all municipal officials of North Bergen, including the members of the Board. Instead, based on the testimony of another expert witness presented by plaintiff at the hearings, the judge chose to ignore the Board's findings and found that a variance should be granted. That was not his proper function, and we reverse.

A licensed professional planner, Edward Kolling, testified on behalf of plaintiff. He stated that the documents concerning prior applications and the current uses in the neighborhood indicate that the area has long permitted both industrial and commercial uses. These retail uses include North American Lobster, McDonald's, Roy Rogers, Aamco Transmission, Marmora's Lamborgini Auto Sales, Meadowlands Motel, Seville Motel, Casual Spain Restaurant, Pizzeria, Juice Bar and Getty Gas Station. He testified that the use of plaintiff's premises for retail purposes was consistent with the then existing uses, would cause no negative impact on the area and would be consistent with the plan.

Michael Kauker, also a licensed planner, was "retained by the Board to advise it as to the issue presented." He testified that a radius of 250 feet is appropriate when considering surrounding uses for a variance application, and within that limit, 21 of 27 uses were conforming. He explained that not only did conforming uses predominate, but because of the barrier in the middle of Tonnelle Avenue, the east and west sides of the street could be considered separate and the nonconforming uses were clustered on the east side. On the west side, where plaintiff is located, only two of the fifteen uses were nonconforming. He opined that retail use on the west side of Tonnelle Avenue was inconsistent with the quantity of industrial development on that side and it was poor planning to introduce a retail use onto a property of which 95% is devoted to light industrial uses.

The trial judge should have evaluated this evidence and stated why it was not adequate support for the Board's action. Instead he criticized the Board for not following his intended directions. Among other things, he said:

> At the remand, the Board did not really consider the issue that I wanted considered. They went back again and talked about the traffic access, which I had said had no basis in the record.
>
> . . .
>
> Where does that leave me? I cannot trust the Zoning Board to look at this case objectively. I gave them a chance. They didn't do it.
>
> . . .
>
> So I have to look at this case as a practical matter as if there is a valid commercial zone, where this kind of operation, distasteful although it may be, can be conducted. And the question then becomes, should there be a variance because this location is particularly suited?
>
> . . .

> Because of the sensitive nature of this business, it's (sic) isolated area makes it ideally suited. With respect to the negative criteria, I do not see the negative criteria in this case. If the Plan has been destroyed, it's (sic) been destroyed by that which has already been tolerated, along Tonnelle Avenue.

We find an additional reason for reversing the ruling by the trial judge. Plaintiff proposed a business use in an industrial zone, a use which clearly does not serve the public welfare. The Supreme Court has long considered the need for an applicant to prove that the new use must be "particularly appropriate," when unauthorized commercial uses are proposed. *See e.g., Fobe Assocs. v. Mayor of Demarest*, 74 *N.J.* 519, 534-35 (1977). This doctrine was reaffirmed in *Medici v. BPR Co.*, 107 *N.J.* 1 (1987):

> A use-variance application for a commercial use not permitted by the zoning ordinance must satisfy the statutory special-reasons standard. That standard has generally been defined in relation to the purposes of zoning, *see N.J.S.A.* 40:55D-2, and our decisions have emphasized the promotion of the general welfare as the zoning purpose that most clearly amplifies the meaning of special reasons. *See Andrews v. Ocean Township, supra*, 30 *N.J.* at 250. Although certain commercial uses may inherently serve the general welfare in a particular community, the typical commercial use can be better described as a convenience to its patrons than as an inherent benefit to the general welfare. For such uses, any benefit to the general welfare derives not from the use itself but from the development of a site in the community that is particularly appropriate for that very enterprise.
>
> [*Id.* at 18.]

During the hearings before the Board, plaintiff's expert opined that the property was "well suited" for the proposed commercial use rather than a permitted use, because the

recent development had been commercial uses rather than industrial. On the other hand, the planner retained by the Board disagreed, stating the proposal was "an insignificant small retail disparate retail use" for a large structure located in an area where 95% of the uses conformed to the zoning.

The existence of other nonconforming uses in the vicinity of the proposed use is not, of itself, a special reason. *See Ward v. Scott*, 11 *N.J.* 117, 128 (1952); *Loscalzo v. Pini*, 228 *N.J.Super.* 291, 301 (App. Div. 1988), *certif. denied* 118 *N.J.* 216 (1989). The immediate past use (wholesale automobile sales) indicates that permitted uses can operate on the property. There is no proof in the record that permitted uses are inappropriate for the site, and there is no evidence that the video store would promote the general welfare as required by *Medici*.

We conclude the record before the Board does not contain evidence overwhelmingly favoring the applicant, and the trial court should not have reversed the Board's denial of the use variance and then granted the requested relief. Rather, based on testimony given by Kauker, the Board could have rationally decided that the west side of Tonnelle Avenue was not predominately used for commercial purposes and the proposed use would not promote the general welfare.

Reversed.

/s/ [ILLEGIBLE]
Clerk

Appendix H

SUPREME COURT OF NEW JERSEY
M-482 September Term 1996
42,793

Filed November 25, 1996

TONNELLE AVENUE BOOKS & VIDEOS, INC.,

Plaintiff-Petitioner,

—v.—

TOWNSHIP OF NORTH BERGEN, et al.,

Defendants-Respondents.

ORDERED

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay pending a petition for a writ of *certiorari* to the Supreme Court of the United States is granted through December 13, 1996, provided movant shall make application to the Supreme Court of the United States for a stay on or before December 6, 1996; and it is further

ORDERED that the failure to make application for a stay to the Supreme Court of the United States as provided in this Order, or the denial of relief by the Supreme Court of the United States shall cause this stay to dissolve automatically.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 22nd day of November, 1996.

/s/ STEPHEN TOWNSEND
CLERK OF THE SUPREME COURT

FILED
JAN 15 1997
CLERK

No. 96-961

In The

Supreme Court of the United States

October Term, 1996

TONNELLE AVENUE BOOKS & VIDEO, INC.,

Petitioner,

vs.

TOWNSHIP OF NORTH BERGEN, NEW JERSEY, TOWNSHIP OF NORTH BERGEN BOARD OF COMMISSIONERS, NICHOLAS J. SACCO, FRANK GARGUILEO, LEO GATTONI, JR., MICHAEL DI GIOVANNI, THOMAS LIGGIO, EDWARD F. RANNOU, Individually,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENTS' BRIEF IN OPPOSITION

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R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 4.17 (7th ed. 1993) 10

The Respondent, Township of North Bergen, New Jersey, Township of North Bergen Board of Commissioners, Nicholas J. Sacco, Frank Garguilo, Leo Gattoni, Jr., Michael DiGiovanni, Thomas Liggio, Edward F. Rannou, Individually ("North Bergen") respectfully requests that the court deny the Petition for a Writ of Certiorari seeking review of the opinion of the Superior Court of New Jersey, Appellate Division filed July 17, 1996, reproduced in the Appendix to the Petition for a Writ of Certiorari ("App.") at App. 1a - 8a.

STATEMENT OF THE CASE

North Bergen respectfully opposes the Petition for Writ of Certiorari which is at best confusing. The Petition selectively utilizes "facts" which aren't supported in the record and cites decisions not made or requested.

A. Course of Proceedings and Disposition of the Case Below.

Petitioner, Tonnelle Avenue Books & Video, Inc. ("Tonnelle") operated a book and video business at 501 Tonnelle Avenue in the Township of North Bergen, It appears that Tonnelle commenced operations on or about July 15, 1991. Unfortunately, Tonnelle never made an effort to obtain the requisite approvals, permits and licenses from North Bergen.

On July 15, 1991, an inspection of the premises at 501 Tonnelle Avenue in North Bergen was conducted by the Licensing Bureau and Construction Code Official of the Township. The inspection revealed that the business was operating without the appropriate business license as required by Township Ordinance 107-85. It was also determined that Tonnelle failed to obtain the necessary construction permits and Certificate of Occupancy. In addition, the sign on the premises violated the Township Zoning Ordinance and was installed

without the required permit. After the inspection, the agent on the premises was advised that the business had to be closed for failure to obtain the appropriate business license.

Thereafter, application was made by Tonnelle for a business license (July 17, 1991), a Building Construction Permit (July 24, 1991), a Certificate of Occupancy (July 25, 1991) and an Electrical Construction Permit (July 26, 1991).

A business license was never issued by the Township. However, a Building Permit was issued on July 24, 1991 and an Electrical Permit issued on July 30, 1991. A Certificate of Continued Occupancy was issued on July 29, 1991. The Construction Code Official, Louis Scala, subsequent to the issuance of the Certificate of Continued Occupancy, reviewed the Zoning Ordinance of the Township. Mr. Scala's investigation revealed that Tonnelle's property is located in the I-Industrial District as established by the Zoning Ordinance. The principal permitted uses in the Industrial District are:

> Uses of a light manufacturing nature, employing a process free from objectionable odors, fumes, dust, vibrations of noise, subject to performance standards.
>
> Wholesale business storage, distribution and warehousing.
>
> Truck Terminals.
>
> Motor vehicle repairs, but not automobile body repair shops.

Article III, Schedule III-C, Township of North Bergen Zoning Ordinance, April, 1987.

Tonnelle's type of use is commercial and not industrial, a use not permitted in the I-Industrial District. Therefore, based upon the zoning and other facts, Mr. Scala revoked the Certificate of Continued Occupancy on August 2, 1991.

Prior to the revocation of the Certificate of Continued Occupancy, Tonnelle commenced an action in lieu of prerogative writs by way of Order to Show Cause. The Honorable Joseph T. Ryan, J.S.C. granted Tonnelle's application, and on August 2, 1991 issued the Order to Show Cause with temporary restraints precluding the Township from restricting Tonnelle's business operations. These restraints were dissolved by Order of Judge Ryan on August 13, 1991. However, this Order was not to take effect until August 16, 1991 at 12:00 noon.

Tonnelle then filed an application with the Zoning Board of Adjustment of the Township of North Bergen ("Board") on August 15, 1991 seeking the following relief: "Such variances as the proposed use may require under N.J.S.A. 40:55D-70c and d, for a reversal of the Order of the Construction Code Official under N.J.S.A. 40:55D-70a and b for a certification of protected non-conforming use, N.J.S.A. 40:55D-68."

The Board held public hearings on August 18, 1991, October 29, 1991 and October 31, 1991. The Board considered Tonnelle's entire application inclusive of the appeal pursuant to N.J.S.A. 40:55D-70a and variance relief pursuant to N.J.S.A. 40:55D-70c and d on October 31, 1991.

The Board rendered its decision as to Tonnelle's appeal pursuant to N.J.S.A. 40:55D-72. The Board voted unanimously that the Construction Code Official acted appropriately in revoking Tonnelle's Certificate of Continued Occupancy (CCO) on August 2, 1991 and that the Township Zoning Ordinance did not permit commercial establishments in the I-Industrial Zone and therefore a use variance was required.

The Board continued the hearing and Tonnelle presented witnesses in furtherance of its application for a use variance.

The Board also considered the testimony of a professional planner retained by the Board, Michael F. Kauker. The Board, at the conclusion of the hearing on October 31, 1991, reserved decision until its next scheduled meeting. The Board reconvened on November 6, 1991 and discussed Tonnelle's application for a use variance. After completion of discussion, the Board voted unanimously to deny Tonnelle's request for a variance.

A memorializing resolution of the Board's decision was adopted in January, 1991.

A Pretrial Hearing was held before Judge Ryan on December 20, 1991 and a Pretrial Order was entered on that date scheduling trial for February 7, 1991. The trial was limited to the following issues:

1. Whether Tonnelle's property is located in a "*de facto*" commercial zone. (Fifth Count of Amended Complaint).

2. Whether North Bergen's Zoning Ordinance is violative of the Municipal Land Use Law. (Seventh Count of Amended Complaint).

3. Whether the Board's actions were arbitrary, capricious and unreasonable. (Twelfth Count of Fifth Amended Complaint).

Trial of this matter was conducted on February 7, 1992 at which time the court concluded that (a) North Bergen's Zoning Ordinance was not violative of the Municipal Land Use Law; (b) that the revocation of the Certificate of Continued Occupancy

issued to Tonnelle was proper based on an interpretation of the local zoning ordinance; and (c) remanded the variance issue pursuant to N.J.S.A.40:55D-70d(1) (use variance) to the Board of Adjustment for the purposes of determining whether the subject premises were particularly suited for the proposed use.

An Order was entered by the Court on February 19, 1992.

The Board, in accordance with Judge Ryan's Order of Remand, reconsidered Tonnelle's variance application at a hearing held on March 18, 1992. At the conclusion of the hearing, the Board affirmed its original denial of Tonnelle's use variance application. No memorializing resolution was adopted by the Board.

The trial court retained jurisdiction of this matter pursuant to the court's Order of February 19, 1992. A hearing was held by Judge Ryan on August 4, 1992 at which time Judge Ryan found that the Board was arbitrary in denying the variance and that the use variance should be granted.

The court entered an Order and Final Judgment as to Count Twelve of the Complaint on September 9, 1992. This judgment was reversed by the Superior Court of New Jersey, Appellate Division in accordance with its opinion filed May 11, 1994. App. 21a-30a. [1]

Thereafter, Judge Ryan determined that as a result of the Appellate Division's May 11, 1994 decision that no issues remained to be decided and entered judgment in favor of North Bergen. This judgment was summarily reversed by the Appellate

---

1. Tonnelle filed a Petition for Certification of the Judgment of the Appellate Division, which Petition was denied by the New Jersey Supreme Court by Order filed July 15, 1994. *See* 137 N.J. 314 (1994).

Division by Order on Emergent Application dated July 14, 1994. App. 19a-20a.

Judge Ryan then reversed his previous decision, and based upon the "record" then existing, issued an opinion on January 26, 1995, (App. 13a-16a), which provided in part:

> At the oral argument on August 4, 1992 I made my decision that the denial of the variance had been arbitrary. At that time I reviewed the history of the case and commented on the big hurry that had taken place in March. I said that I did not intend to remand the case to any agency in North Bergen, because no agency would view it objectively. I also commented on the makeup of the Board of Adjustment which included the Mayor's brother and the aide to another commissioner.
>
> The history of this case together with the previous history of the industrial zone in question, makes it clear beyond a doubt that this business was denied a variance because of its distasteful nature, which, however, is constitutionally protected. Other commercial activities in the zone had been approved by variance or toleration.

(App. 15a).

The court, after review of Affidavits of Services of counsel, entered final judgment on May 26, 1995. App. 9a-12a.

This Judgment was reversed by the Superior Court of New

Jersey, Appellate Division, in accordance with its opinion filed July 17, 1996. (App. 1a-8a). Tonnelle petitioned the Supreme Court of New Jersey for certification which Petition was denied on November 13, 1996. App. 17a.

B. Correction of Misstatements in the Petition.

The opinions of the Superior Court of New Jersey Appellate Division correctly sets forth the facts of this case. App. 1a-8a and App. 21a-30a. In the interest of keeping this Brief brief, North Bergen respectfully directs the Court's attention to the Appellate Division opinions. The opinions, except for one inconsequential factual error, accurately reflect the facts and issues in this case.

Pursuant to United States Supreme Court Rule 15.2, North Bergen brings the following misstatements of fact in the Petition to the Court's attention.

Tonnelle, throughout the Petition, misrepresents that the lower court found that Tonnelle Avenue is a *de facto* commercial zone. The trial court made no finding that a *de facto* commercial zone exists. Even if such a "finding" was made, same was rejected by the Appellate Division in its opinion of May 11, 1994 (App. 21a-30a) which held in pertinent part:

> During the hearings before the Board, plaintiff's expert opined that the property was "well suited" for the proposed commercial use rather than a permitted use, because the recent development had been commercial uses rather than industrial. On the other hand, the planner retained by the Board disagreed, stating the proposal was "an insignificant small retail disparate retail use" for a large

> structure located in an area where 95% of the uses conformed to the zoning.
>
> The existence of other nonconforming uses in the vicinity of the proposed use is not, of itself, a special reason. See *Ward v. Scott*, 11 N.J. 117, 128 (1952); *Loscalzo v. Pini*, 228 N.J. Super. 291, 201 (App. Div. 1988), *certif. denied* 118 N.J. 216 (1989). The immediate past use (wholesale automobile sales) indicates that permitted uses can operate on the property. There is no proof in the record that permitted uses are inappropriate for the site, and there is no evidence that the video store would promote the general welfare as required by *Medici*.

App. 29a-30a. *See also* the Appellate Division Opinion of July 17, 1996. (App. 2a-3a).

Simply stated, the argument that a large number of commercial uses exist that support a *de facto* commercial zone is totally without basis in the record.

Tonnelle also refers to ordinances which "were introduced which were specifically aimed at Petitioner". Petition at 4. However, the ordinances referred to were repealed and never affected Tonnelle's use or operation while the case was pending. This fact does not appear in the Petition.

Tonnelle also asserts throughout the Petition that North Bergen has never attempted to enforce the zoning law against any retail store in the industrial zone except for Tonnelle and a juice bar. Petition at 6. However, no proofs have ever been

presented by Tonnelle as to the legality of any pre-existing non-industrial uses located on Tonnelle Avenue by variance or otherwise. A statement by counsel without a supporting basis in the record is not a fact, which was aptly observed by the Appellate Division.

Tonnelle further asserts that Louis Scala, North Bergen's Construction Code Official, testified that Tonnelle's "existing use was [not] contrary to the Zoning Ordinance". Petition at 6. This is false. Mr. Scala was testifying at a Zoning Board of Adjustment hearing on August 28, 1991 in reference to the contents of a particular violation notice, not that Tonnelle's use was permitted in the zone.

North Bergen must reiterate that a fact is not undisputed merely because same is stated by the attorney for petitioner.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT SATISFY THE STANDARDS GOVERNING REVIEW ON CERTIORARI.

Tonnelle does not identify the special and important reasons under Supreme Court Rule 10 for granting its Petition for a Writ of Certiorari. It is apparent that Tonnelle seeks review of a decision of limited precedential value solely because it believes the Superior Court of New Jersey, Appellate Division reached the wrong conclusion in applying the governing legal principles from *Schad v. Borough of Mount Ephriam*, 452 U.S. 61 (1981) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) to the facts of this case. Although Tonnelle sets forth five bases for granting the Writ, the predominant theme is conflict with *Schad* and *Yick Wo*.

Tonnelle asserts that the New Jersey Appellate Division decision is in direct conflict with *Schad* and *Yick Wo*. Quite simply, the decision is not in conflict. These cases do not permit the operation of Tonnelle's business (merely because the business may be afforded certain First Amendment protection) in contravention to a facially valid constitutional zoning ordinance. The decision in *Schad* and *Yick Wo* reflect only differing outcomes based only on differing fact patterns and differing legal standards in place at the time, and certainly does not constitute a "conflict" that necessitates resolution by this court.

Since the New Jersey Appellate Division correctly applied the holdings of *Schad* and *Yick Wo,* Tonnelle's Petition is necessarily limited to the claim that the Appellate Division misapplied the legal standard to the particular facts of this case. "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice,* § 4.17 at 193 (7th ed. 1993) (footnote omitted). This admonition is particularly apt in this case given the limited precedential effect of the decision below.

II.

THE APPELLATE DIVISION CORRECTLY ADDRESSED TONNELLE'S EQUAL PROTECTION CLAIMS AS NORTH BERGEN'S CONTENT NEUTRAL ZONING ORDINANCE CAN BE ENFORCED IRRESPECTIVE OF TONNELLE'S FIRST AMENDMENT CLAIMS.

The first issue raised by Tonnelle is that the New Jersey Appellate Division erred in its analysis of Tonnelle's equal protection claim.

It appears that Tonnelle's argument is that because its business operations may have some form of First Amendment protection, that all municipal ordinances and regulations are suspect and require strict scrutiny. Tonnelle continues to argue that there are other retail businesses located in the industrial zone where Tonnelle's property is located. This argument has been rejected twice by the New Jersey Appellate Division, first in the court's decision filed May 11, 1994 (App. 21a-30a) reversing the trial court's reversal of the denial of Tonnelle's use variance application and second in the Appellate Division's decision of July 17, 1996. App. 1a-8a.

There is no classification established in the North Bergen Zoning Ordinance that regulates, prohibits or implicates any activity afforded First Amendment protection. North Bergen's ordinance only regulates the location (based upon use criteria) where any commercial activity can occur. This facially valid constitutional zoning ordinance can be enforced irrespective of any First Amendment claim raised by Tonnelle. Tonnelle did not and can not cite a case to this Court that would permit the operation of its business in contravention of local zoning.

All cases cited by Tonnelle are distinguished from the case at bar. *Schad* is not in conflict and is distinguishable based upon the particular facts of that case.

Proving a deprivation of equal protection rights in a dispute with a municipal agency requires a distinct measure of proof, *Rivkin v. Dover Tp. Rent Leveling Bd.*, 143 N.J. 352, 380 (1996). That distinct measure of proof has not been satisfied by Tonnelle. No evidence has been presented by Tonnelle to establish a deprivation of equal protection rights. The same allegations and arguments have been raised by Tonnelle for the past five (5) years and have correctly been rejected by the New Jersey Appellate Division.

III.

THE ALLEGATION THAT TONNELLE WAS THE ONLY RETAIL FACILITY DENIED A VARIANCE IS IRRELEVANT.

Tonnelle alleges that Tonnelle was the only retail store denied a variance and therefore its petition should be granted. Again, it appears that Tonnelle is getting into its *de facto* commercial zone argument, which has twice been rejected by the New Jersey Appellate Division.

Assuming that Tonnelle is correct that it is the only retail business that was denied a variance to operate would not affect the conclusion reached by the New Jersey Appellate Division in its Opinion filed July 17, 1996. (App. 1a-8a). Nothing has been presented as part of the record which would indicate that North Bergen approved any variances for retail uses on Tonnelle Avenue within the past ten years and plaintiff's was the only one denied. The record is clear that any of the uses referred to predate 1987, and therefore this argument is again without merit. Simply stated, the mere fact that variances may have been granted to other retail uses in 1983 or 1984 are insufficient to support Tonnelle's allegation. Tonnelle consistently makes the same argument that (1) we applied for a variance and were denied and (2) this is a *de facto* commercial zone. The record does not support these arguments.

IV.

TONNELLE DID NOT ESTABLISH THAT THERE WAS CLEAR UNDISPUTED EVIDENCE OF ILLICIT MOTIVE.

Unfortunately, we must repeat that the mere allegation by the attorney for Tonnelle that a fact is undisputed does not make

it so. In any event, the allegation of police surveillance was raised previously before the trial court in another affidavit from Tonnelle's attorney, but even saying that police surveillance occurred is not sufficient to establish illicit motive.

In addition, Tonnelle claims that North Bergen brought no enforcement action against any other "retail" facilities located in the industrial zone. It appears that Tonnelle has problems with the standard of proof required. Tonnelle is the plaintiff. Tonnelle did not present any evidence to the trial court that a retail business was operating illegally in the industrial zone contrary to the provision of the North Bergen Zoning Ordinance which would merit an enforcement action. As previously stated, any retail use which existed in the industrial zone existed as a result of approvals which were granted in excess of ten years ago. Enforcement action was not required nor would it be relevant to Tonnelle's claims.

The distinct measure of proof required by *Rivkin, supra*, has not been satisfied as mere allegations or statements from counsel are not evidentiary.

V.

THE CHARACTER OF THE ZONE IS SUBSTANTIALLY INDUSTRIAL.

Tonnelle's Petition contains what can be characterized as the 95% solution. The New Jersey Appellate Division in its decision filed July 17, 1996 contained the following two statements:

> As noted in our earlier opinion, plaintiff's expert testified that the recent development in the zone had been commercial rather than

> industrial, and the Board's expert stated that 95% of the uses conformed to the zoning.

App. 6a.

> There was evidence that other commercial uses were granted variances, but 95% of the zone remained industrial.

App. 7a.

North Bergen candidly admits that these statements are in error.

Michael Kauker, a Professional Planner retained by the North Bergen Zoning Board of Adjustment testified before the Board that 21 out of 27 uses in the zone were conforming. This salient fact was also referred to by the Appellate Division:

> The essential facts relevant to the first appeal are that plaintiff's property is zoned for industrial use, and in that zone twenty-one of the twenty-seven properties conform to the use restrictions of the zoning ordinance.

App. 2a.

Mr. Kauker testified, and the Appellate Division found, that the property on which Tonnelle's retail use was to be introduced was 95% devoted to light industrial use. App. 24a and 30a. However, the reference by the New Jersey Appellate Division that 95% of the zone remained industrial is of no moment and would not affect the decision as there is no doubt that the record supports the conclusion that a substantial portion of the zone is in fact industrial.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 96-961

Supreme Court, U.S.
FILED
JAN 27 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TONNELLE AVENUE BOOKS & VIDEO, INC.,

Petitioner,

—v.—

TOWNSHIP OF NORTH BERGEN, NEW JERSEY, TOWNSHIP OF NORTH BERGEN BOARD OF COMMISSIONERS, NICHOLAS J. SACCO, FRANK GARGUILO, LEO GATTONI, JR., MICHAEL DI GIOVANNI, THOMAS LIGGIO, EDWARD F. RANNOU, Individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE STATE OF NEW JERSEY

PETITIONER'S REPLY BRIEF

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THE FACTS.

The respondents for almost three pages set forth "Correction of Mis-statements in the Petition" (Res. Br. p. 7, 8, 9). The heading should more appropriately read, "Respondents' False Attempt to Create Fact Disputes Despite the Trial Court's Finding No Factual Dispute Exists".

Respondents first assert the July 17, 1996 Appellate Division decision [due process] "* * * accurately reflect[s] the facts and issues in this case". (Res.Br. p. 7) That is not so. The Trial Court's First Amendment Equal Protection opinion (13a-16a) reflects many of the critical facts of respondents' illicit motive in enforcing the industrial zoning ordinance not mentioned or relied on by the Appellate Division. They include, for example, respondents' initial enforcement of the "old obscenity ordinance", not the zoning law, the initial grant by the Zoning Officer, Mr. Scala, of the Certificate of Continued Occupancy, the Mayor's August 28, 1991 Press Conference, the adult-use ordinances prohibiting any operation by petitioner, and stationing police cars with flashing lights in front of petitioner's store, "halted by Court order". (14a)

We now outline in column form some of the mis-statements of respondents, glaringly at odds with the Court findings and the record.

Respondents' Position	*Court Decision or Record*
Tr. Ct. "made no finding * * * a de facto commercial zone exists." (Res.Br. p. 7)	5/11//94 App. Div. states Tr.Ct. found the Zone was "a de facto commercial zone". (25a)

Respondents' Position	*Court Decision or Record*
No basis to find "large number of commercial uses" exist to support a de facto commercial zone. (Res. Br. p. 8)	Tr.Ct. findings: "*casual observer * * * not* consider *this an industrial zone*"; "*on paper*" only and not "*in* reality"; never "*treated*" as an industrial zone, *it was* a de facto commercial *zone*". (Ct.Hr. 8/4/92, T. 29, L. 8-9; (Res.Br. p. 8) T. 30, L. 8-13, Ct. Hr. 2/7/92, T. 55, L. 22-25; T. 56, L. 1-2, Da 177, 178; Ct. Hr.6/10/94, T. 9, L. 22, 23, T. 11, L. 23, 24, emph. sup.)
Adult use ordinances repealed & never affected Tonnelle use or operation. (Res. Br. p. 8)	Adult use ordinances never "affected" petitioner's use because enforcement was stayed. (Pet. Br.p. 5) However, ordinances were aimed at petitioner. (14a)
No proof only enforced zoning law against Tonnelle and juice bar. (Res. Br. p. 8, 9)	For 14 years respondents enforced Zoning Law *only* against Tonnelle and juice bar to prevent nudity. (Da 93; Ct.Hr. 2/7/92, T. 18, L.14-17, p. 20, L. 13-15; Pa 44, Da 153, 178)

Respondents' Position	*Court Decision or Record*
Petitioner falsely states Mr. Scala's testimony existing uses [not] contrary to Zoning Ordinance. (Res.Br.p.9)	" * * * proposed or existing use was [not] contrary to Zoning ordinance." (Da 170) quote is from Bd.Hr. testimony of Mr. Scala, 8/28/91, p. 59, L. 24-25.
Pet. atty. statement "without a supporting basis in the record is not a fact." (aptly observed by the App.Div.) [Res.Br. p.9]	Tr .Ct. no facts really in dispute. (13a) and see (Ct. Hr. 8/19/94, T. 4, L. 10-25; T. 5, L. 1-4; T.23, L.8-11; T.25, L. 10-14; T. 32, L. 18-20). (No "big factual disputes, [only] Characterizations, labels * * * disputed.") There is no such "apt" observation by the App.Div.

Pages 7 and 8 of respondents' Brief contain a long quotation from the May 11, 1994 variance decision holding that "the existence of other non-conforming uses is not a special reason" for granting a variance. This 1994 variance holding furnishes absolutely no basis for the Appellate Division's July 17, 1996 decision, totally ignoring or mis-stating all of plaintiff's First Amendment Equal Protection facts and the Appellate Division's subsequent July 14, 1994 holding. (19a, 20a)

POINT I

EVERY FIRST AMENDMENT CASE CITING YICK-WO INVOLVES AN APPLICATION OF STRICT SCRUTINY AND FIRST AMENDMENT LAW AND NOT DUE PROCESS.

Reply to Respondents' Points I thru IV.

According to respondents, there is "a facially valid constitutional ordinance" correctly applied; therefore, there is no conflict. (Res.Br., p. 10) Respondents then assert there is no *Yick-Wo v. Hopkins*, 118 U.S. 356, 373, 374 (1886) Equal Protection claim because:

> "There is no classification established in the North Bergen Zoning Ordinance that regulates, prohibits or implicates any activity afforded First Amendment protection. * * * This facially valid constitutional zoning ordinance can be enforced irrespective of any First Amendment claim raised by Tonnelle. Tonnelle did not and can not cite a case to this Court that would permit [its] operation * * *". (Res. Br., p. 11)

To the contrary, every First Amendment case cited by petitioner, relying on *Yick-Wo*, established that respondents may *not* apply a facially-valid neutral zoning ordinance with an evil eye and an unequal hand in order to destroy petitioner's First Amendment rights. *Holder v. City of Allentown*, 987 F.2d 188, 197-199 (CA 3, 1993); *Show-World Center, Inc. v. Walsh*, 438 F.Supp. 642, 651-652 (SDNY 1977) (relying on and citing *Yick Wo v. Hopkins*, 118 U.S. 356); *303 West 42nd Street v. Klein*, 46 NY2d 686, 693-698, 416 NYS2d 219, 223-236 (1979); *LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 589, 590 (CA 2 1994). *United States v. Steele*, 461 F.2d 1148, 1150-1152 (CA 9, 1972); *United States v. Falk*, 479 F2d 616 (CA 7, 1973, en banc)

Respondents make *no comment on any* of these cases, all of which are directly applicable. Respondents do not favor this Court with any comment on *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) which is also directly in point. In *Bantam Books,* a Rhode Island statute was, on its face, content-neutral, and it did not regulate or suppress obscenity. (372 U.S. at 66) However, the Supreme Court looked through the form to the substance and held that informal censorship, which is certainly what is involved here, was sufficient to warrant injunctive relief to halt the interference with First Amendment rights.

In addition, the petition pointed out that the July 17, 1996 Appellate Division decision relied on *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 484 (1974) to evaluate all of the evidence on a due-process basis, and that this was in direct conflict with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. ___, 132 L.2d Ed. 487, 499, 500, 115 S.Ct. 2338, 2344 (1995), which mandates that evidence in a First Amendment case, including of course a First Amendment Equal Protection as applied case, employ a strict scrutiny standard. (Pet.Br., p. 13) Respondents do *not* mention or cite these cases. Respondents then assert:

> "Tonnelle consistently makes the same argument that (1) we applied for a variance and were denied and (2) this is a *de facto* commercial zone. The record does not support these arguments." (Res.Br., p. 12)

Respondents, by subdivision(1) of their first sentence quoted above, attempt to twist petitioner's 1991 variance application, and the 1994 due-process variance Appellate Division decision into petitioner's First Amendment Equal Protection as applied case. Petitioner's constitutional claim does *not* involve denial of a variance. We repeat for the umpteenth time that petitioner claims an inter-related First Amendment Equal Protection violation stemming from the

fact that petitioner, exercising First Amendment rights, and a juice bar, because of nudity, were the only retail entities ever prosecuted for being commercial entitities in the industrial zone and only to stop their adult activity in the Township. *Holder v. City of Allentown*, supra. (987 F.2d at 197-199, et al.)

The July 17, 1996 Appellate Division decision, as a matter of law, also erroneously treats petitioner's First Amendment Equal Protection as-applied claim as if it was a variance application case. (7a) As we pointed out in our petition, page 12, a retail store which sells shoes could apply for and be denied a variance because it did not fill out the right form or had inadequate parking, which has nothing to do with being prosecuted or treated selectively because of any constitutional claim, much less the First Amendment.[1]

Respondents also forget that at the February 7, 1992 hearing, respondents' counsel admitted the prior 1980 M-1 industrial zone is "*almost exact*" to the present 1987 industrial zone. (2/7/92 Hr. T.28, L.13-17) The foregoing emphasizes that the Trial Court's finding that the zone was a "de facto commercial zone" spanned ten to fourteen years.

---

[1] Assuming that applying for and being denied a variance is relevant, there was evidence undisputed in the record that the petitioner was, in fact, the only retail store which *in ten (10) years* up through 1991 had applied for, but was denied a variance. Petitioner's motion to the New Jersey Supreme Court to supplement the record by adding this material was granted. (18a)

POINT II

THE ZONE IS IN REALITY A DE FACTO COMMERCIAL ZONE AS THE TRIAL COURT FOUND.

Reply to Respondents' Point V.

The petition pointed out that the Appellate Division, citing *Rova Farms*, supra, 65 NJ at 484, had without basis asserted that the earlier May 11, 1994 Appellate Division variance decision had stated that the Zoning Board expert testified that the zone was 95% industrial.

Respondents candidly admit "these statements are in error". According to the respondents, this error is of no consequence because "there is no doubt that the record supports the conclusion that a substantial portion of the zone is in fact industrial". (Res. Br. p. 14) This statement by respondents is impossible in light of the very specific findings of the Trial Court which, with apologies, we repeat here.

The Trial Court found:

> "*casual observer * * * would not consider this to be an industrial zone*," that it was an *industrial zone* "*on paper*" only and not "*in reality*", has never been "*treated*" by the respondents as an industrial zone, and that "*it was a de facto commercial zone*". (Ct.Hr. 8/4/92, T. 29, L. 8-9; T. 30, L. 8-13, Ct. Hr. 2/7/92, T. 55, L. 22-25; T. 56, L. 1-2, Da 177, 178; Ct. Hr. 6/10/94, T. 9, L. 22, 23, T. 11, L. 23, 24, emphasis supplied)

The Trial Court never would have rendered a judgment for the petitioner if, in fact, a substantial portion of the zone was industrial.

CONCLUSION

The Writ Should Be Granted, the Judgment of the Appellate Division Reversed, the Judgment of the Superior Court Reinstated with Interest and with Directions to Update the Legal Fees.

Dated: January 23, 1997

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